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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEORLYN SMITH IGMA,

Plaintiff and Respondent,

v.

JAMES PATRICK O'ROURKE,

Defendant and Appellant.

G042685

(Super. Ct. No. 30-2009-00265693)

O P I N I O N

Appeal from a judgment of the Appellate Division of the Superior Court of Orange County. Reversed.

Hager & Dowling, Jeffery D. Lim; Law Office of Tioni A. Phan and Tioni A. Phan for Defendant and Appellant.

Solomon's Law Office and Edward L. Solomon for Plaintiff and Respondent.

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Pursuant to California Rules of Court, rule 8.1005, the Appellate Division of the Orange County Superior Court certified this case to this court to answer the following question: What, if any, time requirements apply to a defendant's motion under Code of Civil Procedure section 998, subdivision (e), to offset costs against a judgment for damages?<sup>1</sup> We transferred the case to resolve an important question. (Cal. Rules of Court, rule 8.1005(e)(1).)

We reverse the appellate division's judgment. The trial court entered judgment for plaintiff, Georlyn Smith Igma, without shifting the 998 costs sought by defendant, James Patrick O'Rourke. Rather than seeking review of the court's order at that time by appeal, O'Rourke waited until Igma's judgment was affirmed on appeal before making his motion. As we explain, notions of finality, not the absence of any time requirement in section 998, bar his motion.

## I

The facts are not in dispute. Igma filed a complaint in the court of limited jurisdiction for injuries she suffered in an automobile accident when O'Rourke rear-ended her. The primary issue in dispute was the amount damages. Prior to trial, O'Rourke served a section 998 offer for \$8,900; Igma countered with a 998 offer for \$14,000. The matter did not settle and, following a jury trial, Igma was awarded \$4,924 in damages: \$2,424 in past economic loss, \$2,500 in past noneconomic loss, and zero dollars in future noneconomic loss. Judgment was entered June 28, 2007, and the judgment provided she was the prevailing party. Based on the direction in the judgment ("prevailing party entitled to costs to be submitted by a Memorandum of Costs, unless otherwise determined and ordered"), she timely filed her cost bill.

O'Rourke also filed a cost bill, which included a claim for expert witness costs, because Igma's award did not exceed his 998 offer. His amended cost bill was for

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<sup>1</sup> All further references to "998" or to "section 998" shall refer to Code of Civil Procedure section 998.

\$5,410.15. Igma did not file a motion to tax O'Rourke's cost bill. O'Rourke, however, did not file a motion for costs under section 998. Igma then submitted a proposed judgment. O'Rourke did not file any objections, and the court entered judgment for Igma in the amount of the jury award without shifting the 998 costs requested under O'Rourke's cost bill. If O'Rourke's cost bill had been approved, it potentially could have resulted in a net judgment in his favor of around \$500.

Igma appealed the judgment, asserting the trial court's legal errors led to an inadequate jury award. O'Rourke did not file a cross-appeal, but after the superior court appellate division affirmed the judgment he filed a motion for costs in the trial court because the jury award was less than his 998 offer. The court denied the motion as untimely and O'Rourke appealed. The appellate division reversed. Because there are no time requirements in section 998, the court concluded the motion for costs could be made at any time, even after the judgment in the action had been affirmed. Consequently, the appellate division allowed O'Rourke to pursue his motion for costs. We disagree and reverse the judgment.

## II

Section 998 is a cost-shifting statute. Pertinent here, subdivision (e) of section 998 provides that, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly." In short, if a plaintiff does not receive a more favorable verdict than a defendant's 998 offer, the defendant is entitled to have certain enumerated costs shifted to the plaintiff.

Section 998 does not state, however, when a motion for costs under that section must be brought. The appellate division held that without an express time

requirement in the statute for filing the motion, a motion for costs may be made at any time. Under this analysis, the yardstick for assessing whether a motion is timely appears to be one of reasonableness. Igma, of course, asserts the ruling is wrong and suggests a motion for costs must be made within the time to appeal the judgment. Somewhat awkwardly, O'Rourke concedes the ruling is wrong. While acknowledging the appellate division found his motion timely, he argues we must affirm the holding because it is undisputed he is entitled to shift his 998 costs and he would have made the motion sooner but Igma's requests for appellate review (by appeal and writ of mandate) "stayed any revision of the judgment until the appeal was concluded." Igma has the better of the argument.

What prejudgment costs may be awarded to a prevailing party, and the rules for claiming them, are set out by statute and rule. (See Code Civ. Proc., § 1021 et seq.; Cal. Rules of Court, rule 3.1700 et seq.) Section 998, which refers to the cost statutes in its opening sentence, is part of this comprehensive scheme. It provides that costs may be shifted from one party to the other if certain conditions are met. It is obvious that a motion to shift costs must be made within the time frame when the trial court may award costs because, substantively, it is nothing more than a claim for costs. To allow a motion for costs under section 998 to run by a different procedural clock than other cost bills could, moreover, lead to conflicting orders: a judgment could award the prevailing party costs and a later order could then award the nonprevailing party costs.

O'Rourke impliedly understood the timing requirement; he filed a memorandum of costs before judgment was entered. When the trial court refused to honor it, he had to challenge the court's order. He could have appealed (or in this case, cross-appealed), but he did not. Although he may have statutorily been entitled to these costs, he was required to follow the procedural requirements for claiming them. When he failed to pursue his appellate rights he waived any claim to them. He cannot return to court and seek them now. The trial court's judgment, right or wrong, is final. (See

*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304 [there can be only one final judgment in an action]; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697 [courts will not engage in piecemeal disposition of single action].)

Finally, we reject O'Rourke's claim he could not pursue his section 998 costs in the trial court because Igma's notice of appeal stayed the action. First, he cites no authority that a notice of appeal stays claims for costs, and indeed the law is to the contrary. Second, he filed a memorandum of costs before judgment was entered and could have filed any motion then, as well.

### III

The judgment of the appellate division is reversed. In the interest of justice neither side is awarded costs.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.